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In the Supreme Court
OF THE
United States

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OCTOBER TERM, 1938

No. 158

PACIFIC EMPLOYERS INSURANCE COMPANY,
Petitioner,

vs.

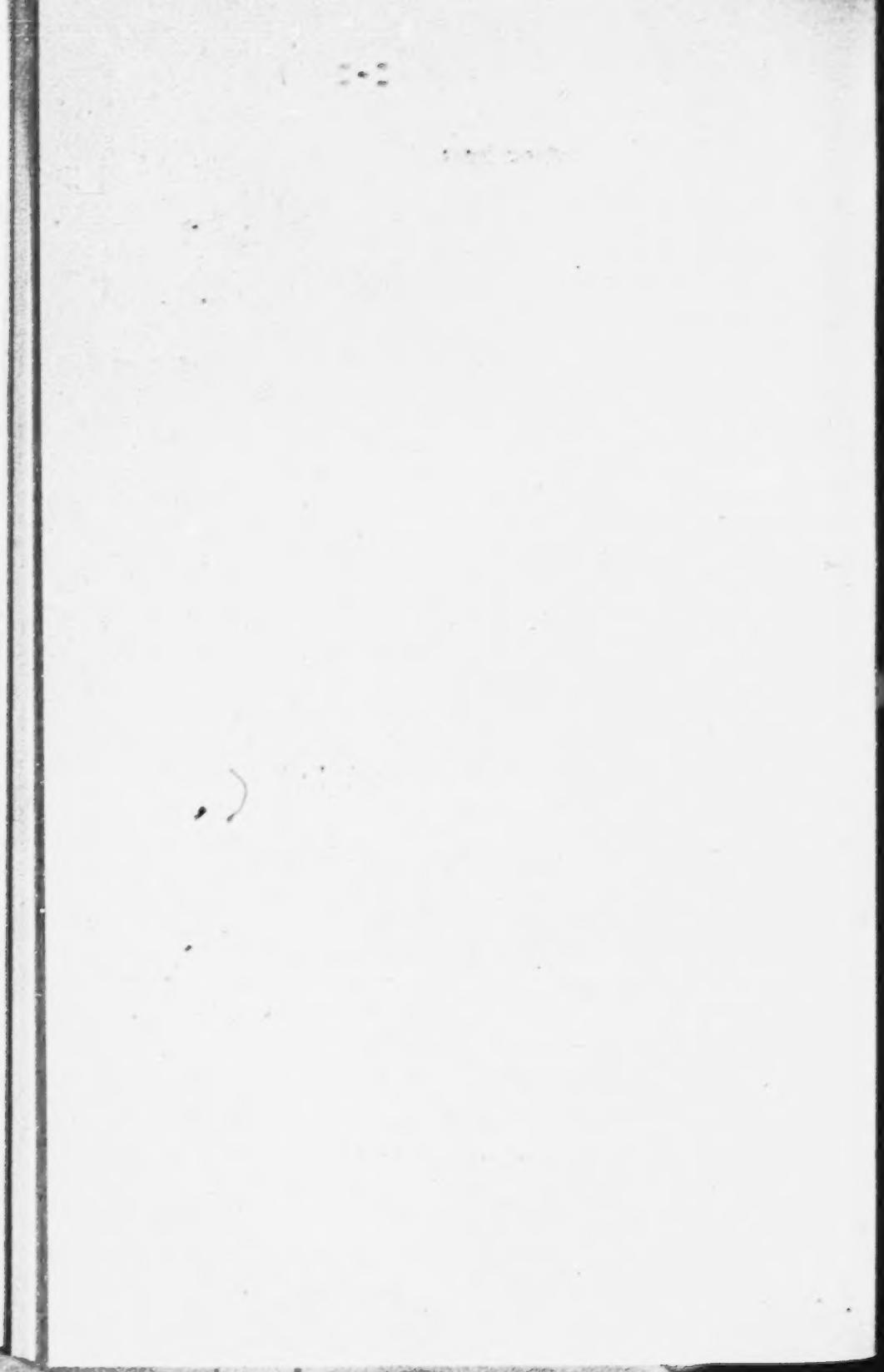
INDUSTRIAL ACCIDENT COMMISSION OF THE
STATE OF CALIFORNIA and KENNETH
TATOR,
Respondents.

Upon Petition for Writ of Certiorari to the Supreme Court
of the State of California.

BRIEF OF PETITIONER.

✓ GEORGE C. FAULKNER,
 Hobart Building, San Francisco, California.
 W. N. MULLEN,
 155 Sansome Street, San Francisco, California.
 Attorneys for Petitioner.

JAMES C. McDERMOTT,
 155 Sansome Street, San Francisco, California,
 Of Counsel.



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BRIEF OF PETITIONER.

OPINIONS BELOW.

The opinion of the Supreme Court of the State of California (R. 64) is reported in 10 Cal. (2d) 567, 75 Pac. (2d) 1058. The Findings and Award of the Industrial Accident Commission of the State of California (R. 40) is unreported.

**JURISDICTION OF THE UNITED STATES
SUPREME COURT.**

On October 10, 1938, the Supreme Court of the United States entered the following order:

“Appeal from the Supreme Court of the State of California. The appeal herein is dismissed for the want of jurisdiction. Section 237(a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937).

“Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by section 237(c), Judicial Code, as amended (43 Stat. 936, 938), certiorari is granted.”

QUESTION PRESENTED.

Respondent, Industrial Accident Commission of the State of California, awarded respondent, Kenneth Tator, compensation under the California Workmen's Compensation, Insurance and Safety Act of 1917, and Amendments thereto, for injury sustained by Tator in that State. The Supreme Court of the State of California affirmed the award. The question presented to the Supreme Court of the United States by petition for writ of Certiorari to the Supreme Court of the State of California is whether the award is contrary to the Constitution and the laws of the United States.

Material Circumstances are: (1) The contract of employment was entered into in the Commonwealth of Massachusetts; (2) The Massachusetts employer had a branch factory in Berkeley, California; (3) Re-

spondent, Kenneth Tator, was injured while on a special errand in the State of California to perform a certain piece of work, upon the completion of which he was to proceed as directed by his employer in Massachusetts; (4) Respondent, Kenneth Tator, was a resident and registered voter of the Commonwealth of Massachusetts; (5) Kenneth Tator's salary was paid and he received said salary in the Commonwealth of Massachusetts, even for the time when he was in California on the special errand and received the injury, which is the subject matter of this action; (6) Upon entering his employment in Massachusetts, respondent Tator failed in writing to reject the terms of the law of Massachusetts which provides that an employee is excluded from suing for damages or claiming compensation against his employer in any state other than Massachusetts, unless at the time the contract of hire is entered into he rejects such provisions of said law by a statement in writing, as provided by said law; (7) upon completion of the medical treatment required for such injury by physicians in California, respondent Tator proceeded, at the direction of his employer, said direction emanating from Massachusetts.

STATUTES INVOLVED.

The pertinent provision of the California Workmen's Compensation, Insurance and Safety Act, Chap. 586, Cal. Stats. 1917, p. 831, is section 6(a). This section is appended (Appendix, p. i), together

with sections 9(a) (Appendix, p. ii), 24(b) and 58 (Appendix, p. iii), which have a bearing upon the decision in this case.

The pertinent provisions of the Massachusetts Workmen's Compensation Act, Mass. Gen. Laws, Ter. Ed., Chapter 152, are sections 24 and 26. These sections are appended. (Appendix, p. iv.)

The pertinent provision of the Constitution of the United States is Article 4, Section 1. It is appended. (Appendix, p. i.)

STATEMENT OF FACTS.

As admitted by the Supreme Court of the State of California (R. 64) and by respondents, respondent Tator was an employee of the Massachusetts' Home Office of the employer and at the time of the injury, the subject of this action, when he lost part of his right hand, he was in the state of California, on a special errand to perfect a certain process of his employer. (R. 34, 38, 39.) The employer in Massachusetts, where Tator was employed and hired under written contract (R. 38, 141) and of which he was a citizen (R. 39), directed him to proceed to Berkeley, California, to perfect a process which had been giving them trouble (R. 34), and at the completion thereof respondent Tator was to wire for directions (R. 141) and he was of the opinion he would be told to stop somewhere enroute home on a good will tour or go directly to his laboratory in Boston. (R. 46.)

Your petitioner was the compensation insurance carrier for the Berkeley branch of said employer (R. 40, 41), while Hartford Indemnity Company was the compensation carrier for the Massachusetts' operations of the employer and for any compensation liability that might be that of the employer under the Massachusetts law. (R. 40, 42.)

The Pacific Coast manager could not discharge Tator whose salary and expenses were paid by the Massachusetts plant (R. 145), his salary checks being deposited in a bank there. (R. 40, 145, 37.) A certain portion of all expenses of the Massachusetts' plant were, as a matter of bookkeeping, charged against the various branches of the employer, of which the Berkeley branch was one. (R. 64, 65, 148, 149.)

Mr. Tator set his own hours. The Berkeley manager did not and could not set his hours of employment. (R. 143.) According to his testimony Mr. Tator spent the major portion of his time in Massachusetts and spent no more than seventeen to nineteen days on the particular process in connection with which he sustained his injury. (R. 34.)

After his injury he obtained medical treatment (R. 135) and some of the bills were paid by him and some were presented for payment to the Berkeley branch of his employer and some were filed with the Industrial Accident Commission of California, after proceedings had begun there for California compensation benefits. (R. 40, 41.)

When Mr. Tator entered employment in Massachusetts he failed in writing to reject the terms of the Massachusetts law, when he signed a written contract of employment, and never thereafter, either in writing or orally, rejected the terms thereof. (R. 38, 39.) This was found as a fact by the California Supreme Court. (R. 64, 67.)

SPECIFICATION OF ERRORS.

- I. The Supreme Court of the State of California erred in refusing to annul the award of the Industrial Accident Commission of the State of California and in permitting any award against petitioner for the injury involved in this case under the Workmen's Compensation Act of the State of California.
- II. The Supreme Court of the State of California erred in denying full faith and credit to the Public Act of the Commonwealth of Massachusetts (Massachusetts General Laws, Tercentenary Edition, Chapter 152, designated: The Massachusetts Workmen's Compensation Act), and erred in holding, on the authority of the case of *Alaska Packers Assn. v. Industrial Accident Commission*, 294 U. S. 532, 79 L. ed. 1044, 55 S. Ct. 518, that it was not a denial of full faith and credit to refuse to apply the Massachusetts Workmen's Compensation Act to the claim for compensation asserted by respondent Tator.

- III. The Supreme Court of the State of California erred in holding that, under the circumstances of this case, the governmental policy of the State of Califor-

nia weighs more heavily in the scale of decision than the interest of the Commonwealth of Massachusetts because medical and hospital expenses were incurred in California and, for that reason, the conflict in laws must be resolved in favor of California, the state where the injury occurred.

IV. The Supreme Court of the State of California erred in refusing to give effect to the contract of hire between petitioner and respondent Tator by which the parties agreed as an incident of the contract of hire to accept as the exclusive remedy for industrial injury the provisions of the Massachusetts Workmen's Compensation Act, no matter where such injury might be received. In so holding, the Supreme Court of the State of California denied full faith and credit to a public act of the Commonwealth of Massachusetts.

V. The Supreme Court of the State of California erred in refusing to hold that the imposition of liability by the State of California for injuries received therein by a non-resident employee, whose contract of employment was made and entered into in the Commonwealth of Massachusetts, is economically unsound and exposes the employer to similar liability under the laws of any state of the Union in which his employees may perform temporary services, or of any state through which they may travel.

SUMMARY OF ARGUMENTS.

This is not a contest between the insurance company which covers the Massachusetts liability of the employer and one which covers liability under the California law, but concerns an important question, for if the effect of the law of one state dies at its boundary, subject to a mere decision of the Court of another state with whose law the matter conflicts, then full faith and credit becomes an item to be applied when the Court wishes to do so.

Sections 24 and 26 of Chapter 152, General Laws of Massachusetts, Tercentenary Edition (Appendix, p. iv) should be read together. The opinion of the California Supreme Court confirms such contention. (R. 64.)

The Award of the Industrial Accident Commission of the State of California (R. 40) gave Mr. Tator continuing medical treatment, which might have to be given in the State of Massachusetts and if such possibility occurs,—and we know he has bought therein an artificial hand,—then in what position is the physician in Massachusetts? Must he come all the way to California to file his claim for services rendered? What if Tator received part of his treatment in California and part in Massachusetts—could it reasonably be said that the major governmental interest was in California?

Respondent Industrial Accident Commission in answer to petition for hearing in the Supreme Court of the State of California (R. 114) states: "To para-

phrase the language of the United States Supreme Court in the *Alaska Packers* case, *supra*, no persuasive reason is shown for denying to California the right to enforce its own laws in its own Courts, and under these circumstances the full faith and credit clause does not require that the statutes of Massachusetts be given that effect."

The California Supreme Court, in its decision, in effect states that it must appear that the interest of the forum is superior to the interest of the foreign state, while the case of *Alaska Packers Assn. v. Ind. Com.*, 294 U. S. 532, 79 L. Ed. 1044, 55 S. Ct. 518, shows clearly that this superior interest must not be assumed but must exist as a matter of fact. Although, in the *Alaska Packers* case, the medical bills were contracted in Alaska, the California Supreme Court and your Honorable Court did not say, as would seem to follow from the case at bar, that the superior governmental interest was in Alaska.

We contend that the award, which was sustained by the Supreme Court of the State of California, was contrary to the Constitution of the United States in the following particulars:

(a) *Full faith and credit.* The adoption by the State of Massachusetts of its Workmen's Compensation Act (Gen. Laws., Ter. Ed., Chapter 152), applicable to injuries sustained by those employed in the Commonwealth of Massachusetts, no matter where injured, was within the power of the legislature of the State. Article IV, Section 1, of the Constitution of

the United States requires that full faith and credit be accorded by one state to the statutes of another.

The Massachusetts Act provides exclusive rights and remedies. (Appendix, p. iv.) So does the California statute. (Appendix, p. i.) There cannot be two exclusive jurisdictions over the same subject matter, and, therefore, if the award was a valid exercise of the exclusive jurisdiction of California, it altogether precludes proceedings under the laws of Massachusetts. The statute of Massachusetts—the jurisdiction in which Tator was hired and from which he was directed to work,—is unquestionably applicable in this case, but it can never be applied, unless it be accorded full faith and credit in California. A double recovery would be contrary to the requirements of due process and would invalidate one or the other of the two statutes on that ground. Consequently, one or the other must give way and the circumstances of this case require that California give effect to the statutes of Massachusetts and to the defenses predicated on them.

The fact that the injury occurred in California is not enough to justify the Courts of that state in holding that California compensation benefits are to be awarded and the employer or its insurance carrier is to be responsible therefor.

(b) It is not for the State of California to determine, in the face of testimony to the contrary, that full faith and credit must not be given to the laws of Massachusetts because it considered that physicians and surgeons in the State of California might not be

paid if the claim were not brought in California, although they could make claim in the State of Massachusetts. Therefore, there is not sufficient interest on the heavier side of the balance to justify the forsaking of the giving of full faith and credit to the laws of Massachusetts.

(c) *A state Court should not determine the major or controlling interest.* If the Courts of a state, where a conflict of laws exist, are allowed to take one slight grain of interest and hold that it is sufficient to be a major interest, and, therefore, a conflict of laws is to be avoided, then full faith and credit has not been given. It is for your Honorable Court to determine if, when, and where such a sufficient governmental interest exists and to say which is heavier in the balance and greater than all interests of the Commonwealth of Massachusetts.

ARGUMENT.

THE AWARD UNDER THE CALIFORNIA WORKMEN'S COMPENSATION ACT AND THE REFUSAL TO RECOGNIZE AS A DEFENSE IN THE CALIFORNIA PROCEEDINGS THE MASSACHUSETTS STATUTE, IS CONTRARY TO ARTICLE 4, SECTION 1, OF THE CONSTITUTION OF THE UNITED STATES.

I.

A STATUTE IS A "PUBLIC ACT" WITHIN THE MEANING OF ARTICLE 4, SECTION 1, OF THE FEDERAL CONSTITUTION, WHICH DECLARES THAT FULL FAITH AND CREDIT SHALL BE GIVEN IN EACH STATE TO THE PUBLIC ACTS OF EVERY OTHER STATE.

Modern Woodmen v. Mixer, 267 U. S. 544, 69 L. Ed. 783, 45 S. Ct. 389, 41 A. L. R. 1384;
Aetna Life Ins. Co. v. Dunken, 266 U. S. 389, 69 L. Ed. 342, 45 S. Ct. 129.

II.

THE REMEDY PROVIDED BY THE MASSACHUSETTS WORKMEN'S COMPENSATION ACT IS AN EXCLUSIVE ONE.

It is clearly the purpose of the Massachusetts Act to preclude any recovery by proceedings brought in another state for injuries received in the course of a Massachusetts employment. The provisions of the Act leave no room for construction. (Sections 24 and 26, Appendix, p. iv.) The statute declares in terms that when a workman is hired within the State, he shall be entitled to compensation thereunder for injuries received outside, as well as inside, the State. And it declares further that for injuries, wherever received, the employee shall be held to have waived his right

of action at common law or under the law of any other jurisdiction in respect to an injury occurring therein, to recover damages or workmen's compensation benefits for personal injuries, if he shall not have given his employer, at the time of his contract of hire, written notice that he claimed such right.

Migues' Case, 281 Mass. 373, 183 N. E. 847;

McLaughlin's Case, 274 Mass. 217, 174 N. E. 338.

III.

UNDER ARTICLE 4, SECTION 1, OF THE FEDERAL CONSTITUTION, FULL FAITH AND CREDIT MUST BE GIVEN BY THE COURTS OF ONE STATE TO A STATUTE OF A SECOND STATE WHICH IS SET UP AS A DEFENSE TO AN ACTION BROUGHT IN THE FIRST STATE.

Bradford Electric Light Co. v. Clapper, 286 U. S. 145, 76 L. Ed. 1026, 52 S. Ct. 571, 82 A. L. R. 696;

Modern Woodmen v. Mixer, 267 U. S. 544, 69 L. Ed. 783, 45 S. Ct. 389, 41 A. L. R. 1384;

Aetna Life Ins. Co. v. Dunken, 266 U. S. 389, 69 L. Ed. 342, 45 S. Ct. 129;

Supreme Council, R. A. v. Green, 237 U. S. 531, 59 L. Ed. 1089, 35 S. Ct. 724;

Western Union Teleg. Co. v. Brown, 234 U. S. 542, 58 L. Ed. 1457, 34 S. Ct. 955;

Atchison, T. & S. F. R. Co. v. Sowers, 213 U. S. 55, 53 L. Ed. 695, 29 S. Ct. 397.

The Answer of petitioner filed at the beginning of the proceeding before the California Industrial Acci-

dent Commission pleaded as a defense the protection herein sought. (R. 31.)

The *Bradford Light* case is directly in point, and should be controlling in the present case. In that case, one hired in Vermont was killed while working in New Hampshire. He resided in Vermont and had been employed in that state as a lineman. The accident occurred when he was sent to the New Hampshire substation to make some emergency repairs. The employer, invoking the full faith and credit clause, set up a special defense: It pleaded that the action was barred by the provisions of the workmen's compensation act of Vermont, which provided that a workman hired within the state was restricted to Vermont compensation benefits even if injured without the state, unless, when employed, it was agreed that the Vermont Act should not be exclusive as to injuries received outside Vermont. The Vermont law also provided that acceptance of the Act was a surrender by the parties of their rights to any other method, form or amount of compensation or determination therefor. Neither the employer nor the employee had filed any statement declining to accept any provision of the Vermont Act.

This Court reversed the decision of the lower Court and held that, while a state may, on occasions, decline to enforce a cause of action arising out of a statute of another state, it may not, under the full faith and credit clause, refuse to give effect to a substantive defense under the applicable statute law of another state. Consequently, it held that it would be a denial

of full faith and credit to the public act of Vermont not to give effect thereto. The Court stated that to refuse to accord full faith and credit to the Vermont Act would subject the defendant to irremediable liability.

Although this case arose in a federal jurisdiction, the principle stated is applicable to state jurisdictions. A federal Court sitting in a state is bound equally with Courts of the state to observe the command of the full faith and credit clause, where applicable. (*Rev. Stat.*, Sections 905, 906, U. S. C., Title 28, Sections 687, 688; *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 48 L. Ed. 870, 24 S. Ct. 598; *Mills v. Duryee*, 7 Cranch 481, 3 L. Ed. 411.)

In the case of *Cole v. Industrial Commission*, 353 Ill. 415, 187 N. E. 520, an employee who was a resident of Indiana had been hired there by contractors who resided and had their principal place of business in that state. He was injured while at work in Illinois. The principles stated in the *Bradford Light Company* case, *supra*, were followed and applied by the Illinois Supreme Court, which held that full faith and credit must be accorded to the Indiana statute which had been set up as a special defense, the remedy provided in said statute being an exclusive one.

A similar question arose in the case of *Ohio v. Chattanooga Boiler & Tank Co.*, 289 U. S. 439, 77 L. Ed. 1307, 53 S. Ct. 663. The employer was a Tennessee corporation and the dead employee had been a resident of that state and had been hired there. The accident for which compensation was claimed occurred in

Ohio. That state, after paying an award of compensation from its insurance fund, brought an original action against the employer to recover the amount of its payment. In defense, the employer relied upon a provision of the Tennessee workmen's compensation law that "the rights and remedies herein granted to an employee subject to this act on account of personal injury or death by accident shall exclude other rights and remedies of such employee, his personal representative, dependents or next of kin, at common law or otherwise, on account of such injury or death". Your Honorable Court sustained the judgment in favor of Ohio but pointed out that the Tennessee statute, as construed and applied by the highest Court of Tennessee, was not exclusive and did not preclude recovery under the law of another state, "and the full faith and credit clause does not require that greater effect be given the Tennessee statute elsewhere than is given in the courts of that State". In other words, the Tennessee statute was not exclusive, as was the Vermont statute in the *Bradford Light* case, because of the interpretation of its Courts, and as is the Massachusetts statute in the present case, and so it should not be said to be a substantive defense under the applicable law of Tennessee. Consequently, the rule of the *Bradford Light* case remains unmodified by the *Chattanooga Boiler Company* case.

Migues' Case, 281 Mass. 373, 183 N. E. 847;

McLaughlin's Case, 274 Mass. 217, 174 N. E. 338.

IV.

WHERE THE STATUTE OF A FOREIGN STATE CONSTITUTES A SUBSTANTIVE DEFENSE TO AN ACTION, A CONFLICT BETWEEN SAID STATUTE OF THE FOREIGN STATE AND THE STATUTE OF THE FORUM CANNOT BE RESOLVED BY APPRAISING THE GOVERNMENTAL INTERESTS OF EACH JURISDICTION AND TURNING THE SCALE OF DECISION ACCORDING TO THEIR WEIGHT.

In the case of *Alaska Packers Association v. Industrial Accident Commission*, 294 U. S. 532, taken by the California Supreme Court as its authority, an employee had been hired in California for seasonal work in Alaska. He was injured in Alaska, but filed a claim for compensation benefits in California. The California law provided that the Industrial Accident Commission thereof should have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of California in those cases where the injured employee was a resident of California and the contract of hire was made in California. (Sec. 58, Appendix p. iv.) The Alaska statute contained no provision that an action for recovery of compensation benefits for an injury received in Alaska could not be brought in any other jurisdiction. It merely provided that no action thereunder should be brought outside the Territory of Alaska.

In other words, the Alaska statute prohibited its enforcement by Courts other than those in the Territory of Alaska. It did not provide that it constituted an exclusive remedy for industrial injuries received within the geographical limits of the Territory. Therefore, when the injured employee sought benefits in

California under the California statute, there was no applicable Alaska statute which could be set up as a substantive defense to such action, and, furthermore, California was precluded from applying the Alaska statute by the very terms of that statute. However, a conflict did exist between the extraterritorial provision of the California statute and the Alaska statute, but it was not a conflict between a statute of the forum and a statute of a foreign state or territory which could be set up as a defense in the forum. The employee had made his claim in the state where hired, which by the very terms of its laws had assumed extraterritorial jurisdiction over injuries sustained elsewhere, when the contract of hire was entered into in California. This Court held, at page 547,* that such a conflict was to be resolved, "not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight".

This decision does not constitute a modification of the doctrine of the case of *Bradford Electric Light Co. v. Clapper*, supra. It merely presents another application of the full faith and credit clause and must be restricted to cases where the statute of the foreign state is not a substantive defense under the applicable law of said foreign state. The principle of the *Bradford Light Company* case still controls in such in-

*Reference is made to the official report.

stances, and is controlling in the present case. We have already shown that the statute of Massachusetts, here concerned, is identical in principle to the statute of Vermont which was held in the *Bradford Light Company* case to be entitled to full faith and credit.

For the same reason, the case of *U. S. Casualty Co. v. Hoage*, 77 Fed. (2d) 542, which will probably be referred to by respondents, is not in point in the consideration of the present case.

Your Honorable Court, in unmistakable language, in the *Alaska Packers* case, *supra*, limits the doctrine of weighing governmental interests to cases where the forum has jurisdiction over the contract of hire.

In the *Alaska Packers Association* case it is said, at page 549:*

"There are only two differences material for present purposes, between the facts of the Clappер case and those presented in this case: The employee here is not a resident of the place in which the employment was begun, and the employment was wholly to be performed in the jurisdiction in which the injury arose. Whether these differences, with a third—that the Vermont statute was intended to preclude resort to any other remedy even without the state—are, when taken with the differences between the New Hampshire and Alaska Compensation laws, sufficient ground for withholding or denying any effect to the California statute in Alaska, we need not now inquire. But it is clear that they do not lessen the interest of California in enforcing its

*Reference is made to the official report.

compensation act within the state, or give any added weight to the interest of Alaska in having its statute enforced in California. We need not repeat what we have already said of the peculiar concern of California in providing a remedy for those in the situation of the present employee. Its interest is sufficient to justify its legislation and is greater than that of Alaska, of which the employee was never a resident and to which he may never return. Nor should the fact that the employment was wholly to be performed in Alaska, although temporary in character, lead to any different result. It neither diminished the interest of California in giving a remedy to the employee, who is a member of a class in the protection of which the state has an especial interest, nor does it enlarge the interest of Alaska whose temporary relationship with the employee has been severed.

"The interest of Alaska is not shown to be superior to that of California. No persuasive reason is shown for denying to California the right to enforce its own laws in its own courts, and in the circumstances the full faith and credit clause does not require that the statutes of Alaska be given that effect."

In the present case, the interests of the two jurisdictions may best be weighed by the simple process of applying the language of the *Bradford Electric Light Company* case, 286 U. S. 145, at page 162, thereto. If the name "California" be substituted for "New Hampshire" and the name "Massachusetts" for "Vermont", then it clearly appears that the interests of

Massachusetts are superior to those of California. To paraphrase: "The interest of *California* was only casual. *Kenneth Tator* was not a resident there. He was not continuously employed there. So far as appears, he had no dependent there. It is difficult to see how the State's interest would be subserved, under such circumstances, by burdening its courts with this legislation."

Again, at page 158: "The relation between *Kenneth Tator* and the Company was created by the law of *Massachusetts*; and as long as that relation persisted its incidents were properly subject to regulation there, for both *Tator* and the Company were at all times residents of *Massachusetts*; the Company's principal place of business was located there; the contract of employment was made there; and the employee's duties required him to go into *California* only for temporary and specific purposes, in response to orders given him at the *Massachusetts* office."

The same test may be made with the *Alaska Packers Assn.* case. In either case, it appears that the governmental interests of Massachusetts are superior to those of California. The opinion of the California Supreme Court (R. 64) makes it evident that it found the interests of Massachusetts superior to those of California when it applied the proper tests. It says at page 576,* "Upon the principles which have been stated and applied in these cases, Mr. Tator cannot recover compensation in California unless this state has a governmental interest in the controversy superior to

*Reference is to the page in the official report.

that of Massachusetts. At the time of his injury, Mr. Tator was a resident of Massachusetts. He was employed there, and was subject to the direction of officers of the employer there located. His salary was paid to him in that state, and he had come to California only on a specific errand for his employer. Under these circumstances the interest of California, like that of New Hampshire in the *Clapper* case, *supra*, is only 'casual' unless there are other facts upon which a governmental interest may be based". (R. 71.)

V.

THERE IS NO ADEQUATE BASIS FOR THE CONCLUSION OF THE SUPREME COURT OF CALIFORNIA THAT TO DENY RECOVERY WOULD BE OBNOXIOUS TO THE PUBLIC POLICY OF CALIFORNIA.

The Supreme Court of the State of California concluded that to deny recovery in California to Mr. Tator would be obnoxious to the public policy of California for the reason that to do so might require physicians and hospitals to go to another state to collect charges for medical care and treatment given to him in California. "Under these circumstances", said the California Court, at page 576,* "the governmental policy of California weighs more heavily in the scale of decision than the law of Massachusetts and the conflict in laws must be resolved in favor of the state where the injury occurred." (R. 73.) In reaching this conclusion, the California Court was

*Reference is made to the official report.

guided by the doctrine of governmental interests laid down in the *Alaska Packers* case, which was discussed in a foregoing section of this argument.

In so holding the California Court is clearly in error. It relies on the cases of *Western Ind. Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398; *Western Metals Supply Co. v. Pillsbury*, 172 Cal. 407, 156 Pac. 491; *Pacific Employers Insurance Company v. French*, 212 Cal. 139, 298 Pac. 23; and, *Independence Indemn. Co. v. Industrial Accident Commission*, 2 Cal. (2d) 397, 41 Pac. (2d) 320. However, these cases cannot be said to establish the rule stated by the California Court.

Compensation, in addition to a mere cash payment, includes the obligation to provide medical and surgical treatment, an obligation which does not necessarily involve payment in cash to the employee himself. (*Western Metals Supply Co. v. Pillsbury*, 172 Cal. 407, 156 Pac. 491, Ann. Cas. 1917 E, 390.) Under the California Workmen's Compensation Act (Sec. 9(a), Appendix p. ii, and Sec. 24(b), Appendix p. iii), the determination by the Industrial Accident Commission of the amount of the reasonable value of medical services rendered, and the imposition of a lien therefor, presupposes the making of an award to the employee or to his dependents entitled to compensation. The lien of the physician who rendered the services is wholly incidental to the principal award, and without such award there can be no lien. (*Pacific Employers Insurance Co. v. French*, 212 Cal. 139, 298 Pac. 23.) This rule is not changed by the decision of *Independence Indem. Co. v. Ind.*

Acc. Com., 2 Cal. (2d) 397, 41 Pac. (2d) 320, which held that a physician who has rendered medical aid to an injured employee, entitled to compensation, may maintain an application to recover the value of his services in a proceeding brought by him, in which both the employer and employee are named as defendants. That case recognizes the rule of the *Pacific Employers Insurance Co.* case, *supra*, that the physician's interest is dependent upon the right of the injured person, and the imposition of a lien for medical services presupposes the making of an award to the employee.

Under the above principles of law laid down by the California Supreme Court it is apparent that that Court was in error in stating that because of public policy it had a greater governmental interest than Massachusetts. Until it is determined that the said Commission has jurisdiction of the case, because of the application of Mr. Tator, and that jurisdiction has attached, it cannot be said that the physicians and hospitals who rendered services to Tator have any interest therein. The imposition of a lien for medical services presupposes the right and existence of jurisdiction to make an award to the employee. It is illogical to say that the jurisdiction of a tribunal, in any case, can be determined by a fact which can have no existence until after the determination or creation of the jurisdiction of said tribunal.

The California Court also has ignored the fact that the physicians and hospitals who rendered services to Tator in California would not be without rea-

in California if the Industrial Accident Commission were held to have no jurisdiction to make an award herein. Said physicians and surgeons would have a cause of action based in contract which could be prosecuted in California Courts. With such remedy in the State of California it would be unnecessary for them to go to a foreign jurisdiction for recovery.

At any rate, had Mr. Tator brought his claim in Massachusetts, it would have been very little inconvenience for the hospitals and physicians to present their claims in that jurisdiction.

In this connection, the fact cannot be ignored that the award of the Industrial Accident Commission in favor of Mr. Tator (R. 40) provides that further surgical treatment is reasonably required to relieve the applicant from the effects of his injury, and that it is the legal duty of the defendant insurance carrier to provide such treatment, without cost to Mr. Tator. As stated in the decision of the California Court (R. 64, 71), Mr. Tator is a resident of Massachusetts. Since he was in California only to perform a specific errand (R. 71), and on completion of it was to go wherever ordered by his employer (R. 37), it is reasonable to presume that further surgical treatment would be required by him in jurisdictions other than California, and probably in Massachusetts, since that was the state of his residence.

It is significant also that the physicians or hospitals who supplied Mr. Tator with medical treatment, nursing, and hospitalization, did not file claims with the Industrial Accident Commission of California

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directly, but turned them over to Mr. Tator's attorneys, who filed them before the Industrial Accident Commission. (R. 154.) Such close cooperation between Mr. Tator's attorneys and the doctors and hospitals could have been exercised had Mr. Tator filed his claim for compensation benefits in Massachusetts.

VI.

THE DECISION OF THE CALIFORNIA SUPREME COURT IS NOT SOUND ECONOMICALLY.

There is one element of paramount importance in the determination of the interest of the two jurisdictions which was not given sufficient consideration by the California Court. That is the economic interest of Massachusetts' citizens. It is economically important that an employer be able to look to the law of the state of his residence, where his business is principally conducted, where the contract of employment is made, and where it is to be principally performed, and do so with the assurance that such law will be given full faith and credit by other states. Otherwise, he must carry workmen's compensation insurance in every state in which, or through which, any employee may travel. This, of course, would materially increase the amount of insurance premiums such an employer would have to pay. This, in turn, would result in an inevitable increase in producers' and consumers' costs. The increased burden on industry, and the inevitable increase in producers' and consumers' costs, are elements of great significance,

and give great weight to the interest of Massachusetts in the present case. (23 *Cal. Law. Rev.* 381, 389; 46 *Harvard Law Rev.* 291, 297.)

Furthermore, the minimum insurance premium in each state would no doubt far exceed the amount of premium actually earned therein. Also, imagine the difficulty in trying to pro rate a traveling salesman's wage for the various states for the purpose of fairly reporting wages paid him while in each state, to say nothing of the possible necessity that his full salary be reported in each state through which he traveled.

VII.

OTHER STATES ARE IN ACCORD WITH THE CONTENTION OF YOUR PETITIONER.

A similar situation to the one at bar has recently been reported in the case of *Employers Liability Assur. Corp. v. Warren* (Supreme Court of Tennessee, February 12, 1938), 112 S. W. (2d) 837. There, a salesman was hired in Kentucky, where the law was the same as in Massachusetts. He was killed in Tennessee and the Kentucky law was applied upon application by his beneficiaries for compensation benefits in the Courts of Tennessee on the theory that full faith and credit should be given the laws of Kentucky.

Also, see:

Matter of Post v. Burger & Gohlke, 216 N. Y. 544.

These are cases where one was hired in one state and worked in another and received his salary checks

from the state where he was hired and it was held his right to compensation was in the state where he was hired and paid.

Likewise, in the case of *Eurbin v. Prudential Ins. Co. of Amer.*, 295 N. Y. S. 247, 250 App. Div. 889, it was held that where one lived in Massachusetts and was employed as a collector and his territory was in Massachusetts, but he was injured in the course of his employment in New York, while on a special errand for his Massachusetts office, that the New York Court could have no jurisdiction. In refusing compensation under the New York Act the Court said the work done by the claimant in New York State was so trivial it must be held that what he did in New York State was incidental to his employment in Massachusetts, thus precluding recovery of compensation under New York law.

CONCLUSION.

All of the arguments presented by respondents to the California Supreme Court were declined and the contentions of your petitioner accepted and approved, with one exception, and, that is, whether or not the governmental interest of California is greater than that of Massachusetts, and, even if such be the case, whether full faith and credit should be denied the laws of the Commonwealth of Massachusetts.

The question in the mind of the Court of California is clearly evidenced by the order vacating submission. (R. 53.) This case was argued at one time

before the Supreme Court of California and then submission was vacated by the Court on its own motion, and again argued on the question stated in the order vacating submission, which was, in effect: Assuming that the Massachusetts Statute, as interpreted by the Courts, exclusively governs the liability for the industrial injury, are there any facts which create a sufficient governmental interest in California to warrant the taking of jurisdiction? (R. 53.)

There is the whole question considered by the California Court. All of the arguments of respondents were considered answered, except the one of governmental interest. In the opinion, which, we contend, reads most favorably to our contention down to its conclusion, we find an adoption of the law as we have stated it and then what it interprets to be the law of the *Alaska Packers* case. Then it is concluded, that the reason for denying full faith and credit to Massachusetts is because "It would be obnoxious to public policy to deny persons who have been injured in this state the right to apply for compensation when to do so might require the physicians and hospitals to go to another state to collect charges for medical care and treatment given to such persons. Under these circumstances the governmental policy of California weighs more heavily in the scale of decision than the law of Massachusetts and the conflict of laws must be resolved in favor of the state where the injury occurred". (R. 73.)

Therefore, we must assume that, because hospitals and doctors might have to go to another state to col-

lect their bills, a greater governmental interest exists in the State of California.

We say, from the foregoing, that the *Bradford Light Company* case, *supra*, should apply and that the greater governmental interest does not exist because physicians and hospitals might have to go to another state to collect their bills. If this be the weight of interest, then, let us consider contracts made in one state to be performed in two or three others. Let us consider any multiplicity of situations which come up in the complicated business of today where full faith and credit is a large item of consideration. Can we say, if your Honorable Court supports this decision of the Supreme Court of the State of California, that if any Court wishes to say it is probably more convenient for one to present a bill in the state of his residence where services have been performed for another, without resort to a Federal Court, and no matter what the consideration, or existence of facts there be, that the state in which the person holds the bill has a governmental interest which weighs more heavily in the scale than the state in which the contract was entered into or to be performed? If this decision is approved by your Honorable Court, not only the question of compensation insurance will be affected, as in the case at bar, but the Courts of other states may assume almost anything to create a superior interest and cast aside constitutional provisions and important decisions of your Honorable Court, and make the full faith and credit doctrine one of convenience and not law, and permit every state in the Union, because of some

trivial cause, to declare that full faith and credit is a fiction, and no longer an equitable reality.

We respectfully submit that the judgment of the Supreme Court of the State of California should be reversed and the cause remanded, with instructions to give effect to the defense based on the Massachusetts statute and to annul the award.

Dated, San Francisco, California,
November 14, 1938.

GEORGE C. FAULKNER,
W. N. MULLEN,
Attorneys for Petitioner.

JAMES C. McDERMOTT,
Of Counsel.

(Appendix Follows.)



Appendix

The provision of the Constitution of the United States which has a bearing on this case is as follows:

"Article IV, Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

* * * * *

The provisions of the California Workmen's Compensation, Insurance and Safety Act of 1917, as amended, which have a bearing upon this case, are as follows:

"Sec. 6 (a) ~~†~~ Liability for the compensation provided by this act, in lieu of any other liability whatever to any person, shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment and for the death of any such employee if the injury shall proximately cause death, in those cases where the following conditions of compensation concur:

- (1) Where, at the time of the injury, both the employer and the employee are subject to the compensation provisions of this act.
- (2) Where, at the time of the injury, the employee is performing service growing out of and incidental

[†]Chapter 586, Laws of 1917, as amended by Chapter 471, Laws of 1919.

[‡]Chapter 161, Laws of 1923.

[§]Chapter 227, Laws of 1929.

to his employment and is acting within the course of his employment.

(3) Where the injury is proximately caused by the employment, either with or without negligence, and is not caused by the intoxication of the injured employee, or is not intentionally self-inflicted."

"Sec. 9.†*‡° Where liability for compensation under this act exists, such compensation shall be furnished or paid for by the employer and be as provided in the following schedule:

(a) Such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches and apparatus, including artificial members, as may reasonably be required to cure and relieve from the effects of the injury, the same to be provided by the employer, and in case of his neglect or refusal seasonably to do so, the employer to be liable for the reasonable expense incurred by or on behalf of the employee in providing the same; provided, that if the employee so requests, the employer shall tender him one change of physicians and shall nominate at least three additional practicing physicians competent to treat the particular case, or as many as may be available if three can not reasonably be named, from whom the employee may choose; the employee shall also be entitled, in any serious case, upon request, to the services of a consulting physician to be provided by the employer; all of said treatment

†Chapter 586, Laws of 1917, as amended by Chapter 471, Laws of 1919.

*Chapter 161, Laws of 1923.

‡Chapter 227, Laws of 1929.

°Chapter 354, Laws of 1925.

to be at the expense of the employer. If the employee so requests, the employer must procure certification by the commission or a commissioner of the competency for the particular case of the consulting or additional physicians; provided, further, that the foregoing provisions regarding a change of physicians shall not apply to those cases where the employer maintains, for his own employees, a hospital and hospital staff, the adequacy and competency of which have been approved by the commission. Nothing contained in this section shall be construed to limit the right of the employee to provide, in any case, at his own expense, a consulting physician or any attending physicians whom he may desire. Controversies between employer and employee, arising under this section, shall be determined by the commission, upon the request of either party."

"Section 24 (b)†*‡° The commission may fix and determine and allow as a lien against any amount to be paid as compensation:

(1) * * *

(2) The reasonable expense incurred by or on behalf of the injured employee, as defined in subsection (a) of section nine hereof." ✓

"Sec. 58.** The commission shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this State in those

[†]Chapter 586, Laws of 1917, as amended by Chapter 471, Laws of 1919.

[‡]Chapter 381, Laws of 1923.

[°]Chapter 355, Laws of 1925.

^{*}Chapter 173, Laws of 1929.

^{**}Chapter 586, Laws of 1917.

cases where the injured employee is a resident of this State at the time of the injury and the contract of hire was made in this State, and any such employee or his dependents shall be entitled to the compensation or death benefits provided by this act."

* * * * *

The provisions of the Massachusetts Workmen's Compensation Act, which have a bearing upon this case, are as follows:

"Sec. 24. An employee of an insured person shall be held to have waived his right of action at common law or under the law of any other jurisdiction in respect to an injury therein occurring, to recover damages for personal injuries if he shall not have given his employer, at the time of his contract of hire, written notice that he claimed such right, or, if the contract of hire was made before the employer became an insured person, if the employee shall not have given the said notice within thirty days of notice of such insurance. An employee who has given notice to his employer that he claimed his right of action, as aforesaid may waive such claim by a written notice, which shall take effect five days after it is delivered to the employer or his agent. The notices required by this section shall be given in such manner as the department may approve."

"Sec. 26. If an employee who has not given notice of his claim of common law rights of action, under section twenty-four, or who has given such notice and has waived the same, receives a personal injury arising out of and in the course of his employment, or arising

out of an ordinary risk of the street while actually engaged, with his employer's authorization, in the business affairs or undertakings of his employer, and whether within or without the commonwealth, he shall be paid compensation by the insurer, as hereinafter provided, if his employer is an insured person at the time of the injury; provided, that as to an injury occurring without the commonwealth he has not given notice of his claim of rights of action under the laws of the jurisdiction wherein such injury occurs or has given such notice and has waived it. For the purposes of this section, any person while operating or using a motor or other vehicle, whether or not belonging to his employer, with his employer's general authorization or approval, in the performance of work in connection with the business affairs or undertakings of his employer, and whether within or without the commonwealth, and any person who, while engaged in the usual course of his trade, business, profession or occupation is ordered by an insured person, or by a person exercising superintendence on behalf of such insured person, to perform work which is not in the usual course of such trade, business, profession or occupation, and, while so performing such work, receives a personal injury, shall be conclusively presumed to be an employee."